Supreme Court, U.S.
FILED

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No. 03-826

IN THE

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL APPENDIX

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APPENDIX

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

No. Civ.A. 3:99-CV-1697-.

DIANA L. READ,
Plaintiff,

v.

BT ALEX. BROWN INCORPORATED,
d/b/a Deutsche Banc Alex. Brown,
Defendant.

Jan. 7, 2002

MEMORANDUM OPINION AND ORDER

FITZWATER, J.

Plaintiff Diana Read ("Read") sues defendant BT Alex. Brown, Inc. d/b/a Deutsche Banc Alex. Brown ("Brown") alleging that Brown discriminated against her, and ultimately terminated her employment, based on her age and sex. Brown moves for summary judgment, contending *inter alia* that it did not discriminate against her and that it discharged her as part of a reduction in force ("RIF").[1] The court grants

[1] Brown also moves to exclude certain expert testimony of J. Herbert Burkman, Ph.D. ("Dr.Burkman") relating to damages. Read moves to exclude expert testimony of Helen Reynolds, Ph.D. ("Dr.Reynolds") and John Maine ("Maine"). Because the testimony of Drs. Burkman and Reynolds relates solely to damages, and the court is granting Brown's motion for summary judgment without reaching the damages question, the court denies the motions as moot. Maine's testimony relates primarily to damages, but also contains an opinion regarding the propriety, as a business matter, of Read's termination. The court has not considered

Brown's motion for the reasons that follow and dismisses this case with prejudice.

I

Brown hired Read as a broker in 1994. She had previously worked in a similar capacity at Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), but Merrill Lynch had discharged her. As part of the hiring process, Read interviewed with Jeff Rupp ("Rupp"), the Sales Manager for Brown's Dallas office, and Michael Crossley ("Crossley"), the Dallas Office Manager. Read informed them that she believed Merrill Lynch had discriminated against her based on her age and sex.[2] Brown hired her as a broker, and she commenced her employment in April 1994. Rupp became the Dallas Office Manager in 1995. Read continued working as a broker until Brown terminated her employment on December 1, 1998 (effective December 31, 1998) as part of a company-wide RIF triggered by a financial crisis at Brown's then-parent company, Banker's Trust.

Read alleges that, while employed at Brown, she was "subjected to differential terms and conditions of employment than male and/or younger employees." P. Compl. at ¶ 7. She also maintains that Brown terminated her employment "because she was a female and/or because of her age and her termination was a part of defendant's pattern and practice of treating females and/or older employees differently and more negatively than male and/or younger employees." *Id.* at ¶ 8.

Maine's testimony in deciding Brown's motion and therefore denies as moot Read's motion to disqualify Maine.

[2] Read sued Merrill Lynch in 1994. *See Read v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Civil Action No. 3:94-CV-1072-T (Maloney, J.). The parties resolved the suit through arbitration, and the case was dismissed on October 23, 1997.

Read filed the instant suit alleging sex discrimination, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and/or the Texas Commission on Human Rights Act ("TCHRA"), *Tex. Labor Code Ann.* §§ 21.001-21.405 (West 1996 & Supp.2002), and age discrimination, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, and/or the TCHRA.

II

The court first considers whether Brown is entitled to summary judgment on Read's claims of having been subjected to "differential terms and conditions" during her employment.

In her brief and in answer to Brown's interrogatories, Read identifies five acts that she maintains constitute differential terms and conditions of employment. She alleges that she (1) received less sales assistant coverage than did male and/or younger employees, (2) was offered less access to training programs than were male and/or younger employees, (3) received fewer corporate assignments than did male and/or younger employees, (4) received little to no help with prospects, while such help was given to male and/or younger employees, and (5) was subjected by Rupp to rude and condescending treatment. *See* P. Br. at 5-9; D.App. 188-89. Even if the court assumes *arguendo* that the claims she bases on this alleged conduct are timely,[3] her allegations are not

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[3] Brown contends these claims are time-barred because Read did not file a timely discrimination charge. The court will assume *arguendo*, for purposes of applying the statute of limitations, that Brown's alleged course of discriminatory conduct constitutes a continuing violation and will treat as timely the claims that stem from the alleged differential terms and conditions of employment because they were made the subject of a charge of discrimination filed with the Equal Employment Opportunity Commission within 300 days of Read's termination. *See* D.App. 185.

supported by sufficient evidence to enable a reasonable trier of fact to find that Brown intentionally discriminated against her.[4]

Concerning her claim that she received less sales assistant coverage than did male and/or younger employees, the evidence would only reasonably permit the finding that the sales assistant assigned to Read during the first period complained of was assigned to three or four other brokers, all of whom were male, and at least one of whom was over age 40 at the time, and at least one of whom was under age 40. *See id.* at 53-54. The evidence also indicates that this situation persisted for less than one year of the four-year period that Read was employed at Brown. *See id.* at 53-56. Read's complaint relating to inadequate sales assistant coverage during a second period of time stems from having been assigned to share a sales assistant with a single male broker, who was over age 40 at the time. *See id.* at 56-57. Read admits that during this period her production levels did not entitle her, under firm policy, to her own sales assistant. *See id.* at 30. The evidence indicates that Read's objections to the adequacy of her sales assistant coverage ended in 1997, when Rupp assigned his own sales assistant to Read. *See id.* at 60-61. Taken as a whole, this evidence is insufficient to enable a

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[4] Brown also argues that none of these different terms and conditions of employment is an adverse employment action. *See* D. Br. at 15. Brown cites *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), for the definition of "adverse employment action." But *Burlington* is a case in which the Supreme Court defined "adverse employment action" in order to decide when an employer is vicariously liable for the sexually harassing conduct of an employee. *See id.* at 753-54. Title VII and the ADEA each prohibit discrimination against an individual "with respect to [her] . . . terms, conditions, or privileges of employment[.]" The concept of term, condition, or privilege of employment is not the equivalent of "adverse employment action," as Brown uses the terms.

reasonable trier of fact to find that the decisions relating to Read's sales assistant coverage were motivated by discriminatory animus based on age or sex.

Read also alleges that, based on her age or sex, she was less frequently given access to training programs than were male and/or younger employees. *See* P. Br. at 8. Read relies on her own deposition testimony that she recalled that Rupp sent two newly-hired younger male brokers to participate in a workshop at the Wharton School of Business relating to brokerage software. *See* P.App. 129-32. Read also cites her deposition testimony that another male broker attended a similar workshop. *See id.* at 132. Although this evidence indicates Read's desire, in retrospect, to have attended such programs, *see id.*, she has adduced no proof that she ever asked, or was denied the opportunity, to attend any training seminar or program. This proof is inadequate to enable a reasonable trier of fact to find that the decisions relating to Read's participation in training programs or beta testing of new products were motivated by discriminatory animus based on either age or sex.

In support of her contention that she received fewer corporate assignments than did male and/or younger employees, Read cites her deposition testimony that Rupp made an effort to educate younger brokers about how to bring corporate investment banking clients to the firm. *See* P.App. 107-08. She relies as evidence of differential treatment on the fact that Rupp accompanied Lynda Villareal ("Villareal"), a younger female broker, on trips to see investment banking clients. *See id.* Read also asserts that Rupp more frequently gave "friends of the company" referrals to younger and/or male brokers. *See* P. Br. at 8. Her testimony specifically identifies only a single broker named Landers, a male over age 40, as an employee who received such referrals. *See* D.App. 108- 09. Read also relies on evidence that Rupp attended client meetings outside the office with two male

brokers. *See* P.App. 15-16, 40. She avers in her deposition that Rupp only once accompanied her on a prospecting trip outside the office. *See id.* at 100-01. She asserts that when Rupp did meet with her prospective clients, the meetings were typically held at Brown's office. *See id.* This evidence relating to these specific instances of Rupp's allegedly preferential business support of younger and/or male brokers would not permit a reasonable trier of fact to find that Rupp's actions were motivated by an intent to discriminate on the basis of age or sex.

Read contends that Rupp "treated younger and male brokers with more respect than he treated Read." P. Br. at 9. In support of this contention, Read relies on her own account of two incidents over the course of her employment at Brown. The first instance in which Read alleges that Rupp was "rude and condescending" in public occurred at a weekly meeting. Read alleges that, in response to a question she asked, "[Rupp] just acted like I should have known that and that was dumb for me to even ask that question." P.App. 123. The second incident occurred when Read was searching for a venture capital book, and Rupp allegedly yelled at her during her attempt to locate it. *See* D.App. 98-99. Read also offers testimony that two male brokers reported that Rupp was never rude to them in public. *See* P.App. 20, 43. This evidence is insufficient to permit a reasonable trier of fact to find that Rupp's behavior was motivated by discriminatory intent based on Read's age or sex.

After considering each of plaintiff's allegations relating to differential terms and conditions of employment, separately and as a whole, the court holds that a reasonable trier of fact could not find that Brown intentionally discriminated against Read based on her age or sex. The court therefore grants Brown's motion for summary judgment on these claims.

III

Read also alleges that Brown terminated her employment based on her sex or age.

A

Read contends she has direct evidence of unlawful discrimination. She relies on three comments that Rupp allegedly made over a three-year period as direct evidence of discriminatory intent sufficient to raise a genuine issue of material fact that precludes summary judgment.

Read asserts that Rupp made the first of these comments during a 1995 breakfast meeting with her. According to Read's deposition, the substance of the comment was as follows:

> [Rupp said] "when brokers get old, they slow down, or you know, when brokers get older, they slow down. And then the next thing he said was you know, even though you're one of the old ones, I-oh, he said-okay. There was another broker in the office, oh God, what was his-oh, Jim Sale, he said, Jim is old but he's not slow. And he said, so I've really, either he said hoping or anticipating that even though you're older, you're not going to be slow.

D.App. 64-65.

Read contends that Rupp made the second comment in the context of deciding who should be hired as her sales assistant. According to Read's deposition testimony, Rupp stated, in reference to the need to hire a new sales assistant:

> I think we need to change to the psychology around here. These girls back here are not working very hard and what I'd like to do is for us to hire a young man just out of college who will work his-I don't know what he said, buns off or work himself to death, work all kinds of hours and show these girls back here how to work.

D.App. 106.

The third comment on which Read relies to establish discriminatory intent is one alleged to have taken place after her termination, during a telephone call that Rupp placed to a prospective employer of Read's to clarify why Brown terminated Read. According to Read's deposition testimony:

> Jeff talked to the Oppenheimer manager, and the Oppenheimer manager asked Jeff why would you be terminating someone that does this much production, that does this much-has this much in assets[.] [ ] And Jeff said, We have very high standards here; we're like Goldman Sachs; you know, we just-I can't remember specifically how it was said. We don't hire someone like her; she doesn't fit the image and some other manager wouldn't know what my business plan is.

D.App. 102. Read maintains that this comment demonstrates sex bias on the part of Rupp because "Goldman Sachs is pretty much known for not hiring women." D.App. 105.

Brown urges that these three comments constitute "stray remarks" that do not permit a reasonable inference of discrimination. Under Fifth Circuit precedent that has been reaffirmed subsequent to the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), these remarks are evaluated in the summary judgment context according to the following standard:

> [F]or comments in the workplace to provide sufficient evidence of discrimination, they must be 1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.

Auguster v. Vermillion Parish Sch. Bd., 249 F.3d 400, 405 (5th Cir. 2001) (internal quotation marks deleted) (quoting *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996));

accord Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 400-01 (5th Cir. 2000) (similarly reaffirming *Brown* stray remarks doctrine in post-*Reeves* case). Stray remarks are insufficient to enable a claim to survive summary judgment when a plaintiff fails to produce substantial evidence of pretext. *See Auguster*, 249 F.3d at 404-05.

Viewing the evidence in the light most favorable to Read as the summary judgment nonmovant, the court holds that the first comment-concerning older brokers becoming "slow"—was related to the protected class of persons of which Read is a member and was made by an individual with authority over the employment decision at issue. Even if the court assumes that this remark in fact concerned the employment decision at issue (Read's termination), the comment was made in 1995, at the beginning of an employment relationship that did not end until December 1998. Therefore, it was not made proximate in time to her termination and must be regarded as a stray remark that does raise a genuine issue of material fact regarding discriminatory intent.

The second comment relates to the hiring of a sales assistant for Read. This remark is insufficiently related to Read's termination to raise a genuine issue of material fact regarding Rupp's discriminatory intent in effecting her discharge. Moreover, this comment is not alleged to have been made at a time proximate to the decision to terminate her employment.

The third comment, that Brown is "like Goldman Sachs," was proximate to the termination decision, was alleged to have been made by the person responsible for Read's discharge, and was intended to be an explanation of-and therefore is "related to"-the firing. But the only evidence that Read offers to support her contention that the comment was related to the protected class of persons of which she is a member is her own testimony that "Goldman Sachs is pretty much known for not hiring women." D.App. 105. Read's

subjective belief regarding how Rupp's comment should be interpreted is insufficient to permit the finding that the remark was related to women. *See Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983). This is particularly so given the plausible and well-supported alternative interpretations of this remark that Brown advances. *See* D.App. 140, 210 (noting similarities between brokerage business plans of Brown and Goldman Sachs and indicating that Brown frequently compared its business model to that of Goldman Sachs).

B

1

Because the comments that Read cites do not constitute sufficient direct evidence of intent to discriminate on the basis of sex or age, she must rely on the familiar burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Read must first establish a prima facie case of discrimination. *See Pratt v. City of Houston*, 247 F.3d 601, 606 (5th Cir.2001) (citing *McDonnell Douglas*, 411 U.S. at 802-04). Once Read meets this burden, Brown is obligated to articulate a legitimate, nondiscriminatory reason for the employment decision at issue. *See Reeves*, 530 U.S. at 142. This is a burden of production, not persuasion. *Id.* Once Brown meets this production burden, the presumption of discrimination disappears. *Id.* Read must then prove by a preponderance of the evidence that the legitimate reason offered is not the true reason but is a pretext for discrimination. *Id.* "[T]he plaintiff may attempt to establish that [she] was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (quoting *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude

that the employer unlawfully discriminated." *Id.* at 148. "[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 147. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* At the summary judgment stage, Read need only raise a genuine issue of material fact. *See Tutton v. Garland Indep. Sch. Dist.*, 733 F.Supp. 1113, 1116 (N.D.Tex.1990) (Fitzwater, J.).

2

The court must initially decide whether Read has established a prima facie case. The first three elements of the prima facie case for Title VII and ADEA claims are the same. She must prove that she (1) belongs to the protected category, (2) was qualified for the position she held, and (3) was discharged. *See Meinecke v. H & R Block of Houston*, 66 F.3d 77, 83 (5th Cir. 1995). In a RIF case, the fourth element she must prove to establish a Title VII prima facie case is that "after [the] discharge others who were not members of the protected class remained in similar positions. *Id.* (citing *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990) (internal quotation marks omitted)). The fourth element in a RIF case under the ADEA is that she was "otherwise discharged because of [her] age." *Id.* (citing *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993)).

The first three elements of her Title VII prima facie case are undisputed. Concerning the fourth element, the record contains uncontested evidence that after the discharge, others who were not members of the protected class (*i.e.*, men) remained in similar positions. *See* D.App. 205-06. Similarly, the first three elements of Read's prima facie case under the

ADEA are undisputed and are adequately established by the record. With respect to the fourth, the Fifth Circuit has noted:

> Although we require more than a conclusory allegation of age discrimination to establish a prima facie case, we do not require much more. Generally, we demand only that a plaintiff present some evidence of differential treatment between older and younger employees.

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 645 (5th Cir. 1985) (internal citations omitted). Thus Read may establish a prima facie case of age discrimination merely by showing that "[she was] discharged, while other younger [brokers] remained on the payroll." *EEOC v. Tex. Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996). The undisputed evidence demonstrates that Read has satisfied this requirement and therefore has established a prima facie case under the ADEA. *See* D.App. 205-06.

3

Brown has met its burden of production by adducing substantial evidence that it terminated Read as part of a RIF in response to adverse business conditions suffered during the latter part of 1998. The evidence indicates that in late 1998, Brown's then-parent company, Banker's Trust, experienced a severe financial crisis. *See* D.App. 211, 150. In response, senior management issued directives requiring cost-cutting within Banker's Trust and its subsidiaries, including the Brown Private Client Services Division. *See id.* at 145. Having received a target cost-reduction amount. Tim Schweizer ("Schweizer"), head of the Private Client Services Division, instructed the Branch Managers under his supervision, including Rupp, to reduce expenses. *See id.* at 145, 177. At about 6:00 p.m. on November 18, 1998, Rupp received an e-mail that communicated the reduction directive for the Dallas office. *See id* . at 220, 212. He was instructed to reduce expenses for his branch by $384,000, allocating

expense cuts among four categories, by 8:30 a.m. on November 20, 1998. *Id.* Brown has introduced evidence that shows that, under this reduction directive, it selected Read for termination based on her overall performance. *See id.* at 212. Its proof also shows that it terminated and retained brokers who were both older and younger than age 40 and kept the only other female broker employed in the office. *See id.* at 205-06.

A RIF is a legitimate, nondiscriminatory reason for discharge. *See Tex. Instruments*, 100 F.3d at 1181. In the RIF context, therefore, "the fact that an employee is qualified for [her] job is less relevant-some employees may have to be let go despite competent performance." *Id.* (citing *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 124 (5th Cir. 1996)). An employee challenging the termination on the grounds of unlawful discrimination may still raise a genuine issue of material fact, however, upon a showing that she was terminated in favor of "clearly less qualified individuals" outside the protected class. *Id.*

Brown has produced ample proof that details and supports its stated rationale for selecting Read as a broker to be terminated. *See* D. Br. at 6-11. The evidence indicates that Read was extended an offer of employment with Brown at the conclusion of an interview process that included both an interview with Rupp and disclosure of Read's belief that she had been discriminated against by her previous employer, Merrill Lynch. *See* D.App. 24-27, 142. Among the factors that motivated Brown's decision to hire Read was the expectation that she would continue to produce commission revenue at a level similar to that which she had generated at Merrill Lynch. *See id.* at 15-16. During the course of her employment at Brown, Read never reached the level of production she had attained in her final year at Merrill Lynch, nor did she at any time during her tenure at Brown attain management's stated production goals. *See* D.App. 21, 211.

She consistently performed in the bottom half, if not bottom quartile, of brokers. *Id.* at 211. Moreover, Read's production consistently failed to rise above the "break-even" point below which management estimated that retention of a broker cost, rather than made, the firm money. *See id* at 211, 49. The evidence indicates that the "break-even" level applicable during the year 1998 was communicated to Read specifically and to brokers in the Dallas office as a group. *See* D.App. 168-69, 48-49.

The summary judgment record also indicates that Brown's parent company, Banker's Trust, experienced a severe financial crisis in late 1998. It is uncontested that in response to this crisis, Rupp received a directive from Jean H. Tighe, a Principal in the Private Client Division, to reduce costs at the Dallas office. *See id.* at 220, 212. The evidence reflects that Rupp, working within a schedule that required submission of his cost reduction proposal in fewer than two business days, formulated a plan to achieve the mandated cost reductions that included a reduction in travel and entertainment expenses, the solicitation of volunteers for early retirement, elimination of two projected hires for 1999, elimination of a Bloomberg information terminal, a reduction in communication costs, the transfer of a sales assistant to a receptionist position, and the termination of Read's employment. *See id.* at 213, 222. The other female broker employed in Brown's Dallas office, Villareal, was retained. *See id.* at 212.

4

Read attempts to offer proof that Brown's proffered reason for the termination was pretextual based on several arguments that would require the finder of fact to infer discriminatory intent.

First, Read advances each of the "differential terms and conditions of employment" to which Rupp allegedly subjected her, *see supra* at § II, as evidence that the termination

decision was similarly motivated by discriminatory intent. Because the court has already held that there is no genuine issue of material fact regarding a discriminatory animus for the acts themselves, this conduct is insufficient to raise a genuine issue of material fact regarding the alleged discriminatory motives behind the termination.

Second, Read asserts that inconsistencies in Brown's expression of the justification for the termination raise a genuine issue of material fact regarding pretext. *See* P. Br. at 32-34. In Brown's answers to plaintiff's first set of interrogatories, it articulates the reasons for Read's termination:

> *Interrogatory No. 1:*
>
> > Please state the exact reason(s) Defendants made the decision to terminate Plaintiff's employment.
>
> *Answer:*
>
> > As part of a national expense management reduction process within Banker's Trust and its subsidiaries, the Private Client Division in the Dallas office was required to reduce its expenses. Plaintiff's employment was terminated as a part of this process due to her performance.

P.App. 229. This explanation comports precisely with Rupp's deposition testimony concerning the reasons for the termination, *see id.* at 150-51, and with Read's own account of the explanation offered by Rupp at the time he informed her of the termination, *see id.* at 136. The fact that the U-5 form that Brown was required to file with the Securities and Exchange Commission upon Read's termination stated only that Read was "downstaffed," or that the deposition testimony of Schweizer, a person whom plaintiff admits was not responsible for the termination decision, *see* P. Br. 27, emphasized Read's lack of performance as the reason for the termination, would not allow a reasonable trier of fact to find that Brown's

proffered explanation was pretextual. Therefore, viewing the evidence in the light most favorable to Read as the nonmovant, the court discerns no inconsistency in the articulated reasons that is sufficient to create a genuine fact issue, and it holds that the purported inconsistencies are insufficient to preclude summary judgment.

Third, plaintiff urges that pretext may be found in "[Brown's] inability to establish a decision-making timeline." *Id.* at 34. Viewing the evidence in the light most favorable to Read as the nonmovant, the court discerns no inconsistency between Rupp's account of when the decision to terminate Read was made, *see* P.App. 166 (stating that the cost savings from terminating Read were introduced into the Dallas Office's cost reduction proposal sometime between Rupp's initial formulation of ideas on November 18, 1998 and the sending of the final proposal on November 20, 1998), and that of Mary Hogan ("Hogan"), *see id.* at 26-27 (reproducing Hogan's testimony that, in her capacity as Office Administrator, she suggested Read's termination during a late-night meeting with Rupp on November 18, 1998). Therefore, no reasonable inference of pretext can be drawn based on that contention. Given this factual background, Read's evidence that the e-mail communicating the cost reduction proposal was sent to the Baltimore office three-and-a-half hours after the requested time for submitting such proposals, *see id.* at 216, 223, would not permit a reasonable finder of fact to find pretext.

In conjunction with plaintiff's attempts to adduce specific evidence that Brown's stated reasons are pretextual, Read advances the general contention that summary judgment is improper because a jury must be allowed to judge the credibility of the employer's proffered reasons for termination where those reasons rest upon any degree of subjective judgment of performance. *See* P. Br. at 33-34. The court disagrees. In *Medina v. Ramsey Steel Co.*, 238 F. 3d 674, 681

(5th Cir. 2001), the Fifth Circuit held that where the defendant's proffered justification for an adverse employment decision was based *entirely* on subjective criteria, plaintiff's alleged failure to meet these entirely subjective criteria may not be considered sufficient as a matter of law to defeat plaintiff's prima facie case. Here, Read established a prima facie case. Under the *McDonnell Douglas* burden shifting framework, once Brown produced evidence of a legitimate, nondiscriminatory reason for the employment decision at issue, the burden shifted to Read to prove by a preponderance of the evidence that the legitimate reason offered was not the true reason but was a pretext for discrimination. *See Reeves*, 530 U.S. at 142. Because the measures of performance that Brown relies on to justify Read's termination are to a large degree quantifiable and therefore not entirely subjective, evaluation of its proffered justification does not rest purely on the testimonial credibility of the employer. *Cf. Lindsey v. Prive Corp.*, 987 F.2d 324, 326 (5th Cir. 1993) (reversing summary judgment based on plaintiff's failure to establish prima facie case under ADEA where plaintiff was denied promotion to position of dancer based on employer's proffered reason that she was not "beautiful, gorgeous, and sophisticated"). Summary judgment is therefore proper if the evidence that plaintiff presents does not raise a genuine issue of material fact regarding pretext [5] and, taken as a whole, would not enable a reasonable trier of fact to find intentional discrimination.

5

In order to find from the evidence that Read has adduced that her age and/or sex was a motivating factor in Brown's decision to terminate her, a jury would be required to con-

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[5] The court will treat the arguments that Read advances under the heading "Reasons Given [by Brown] Are Not Credible," *see* P. Br. at 35-36, as efforts to adduce evidence of pretext.

clude that, after hiring her in 1994 with knowledge of her sex and age, Brown decided in 1998 to terminate her based on one or both factors. It would be necessary for the jury to find that Brown used the financial crisis that Banker's Trust experienced in late 1998, and the consequent cost-cutting directives that required immediate implementation by local management, as an artifice for putting into action a discriminatory intent against Read. In the face of evidence that Read's performance had for several years fallen below established standards, the jury would have to conclude that her performance was not the real reason Brown selected Read for termination under the RIF. The evidentiary support for this inference would stem only from (1) three comments made sporadically during the more than four- year course of Read's employment,[6] (2) allegedly different terms and conditions of employment that are themselves unaccompanied by evidence of discriminatory intent, and (3) testimony and documents that fail to establish an inconsistency in Brown's articulation of its reason for the termination. Because it would be unreasonable to find intentional discrimination or pretext based on this evidence, summary judgment is warranted.

IV

Because Texas state courts construe the TCHRA consistently with federal law interpreting Title VII and the ADEA, the court grants Brown's motion for summary judgment on Read's state law causes of action, as well. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 n. 2 (5th Cir. 1999) ("the law governing claims under the TCHRA and

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[6] Although the court has held above that the three comments cited are insufficient direct evidence of discrimination, *see supra* at § III(A), the court still weighs these comments in making its determination regarding the sufficiency of the evidence relating to pretext. Where, however, as here, plaintiff has failed to produce substantial evidence of pretext, these stray remarks are insufficient to defeat the motion for summary judgment. *See Auguster*, 249 F.3d at 404-05.

Title VII is identical"); *Caballero v. Cent. Power & Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993) ("Another stated purpose [of the TCHRA] is to coordinate and conform with federal law under Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act." (internal citations omitted)).

* * *

Brown's motion for summary judgment is granted, and this action is dismissed with prejudice by judgment filed today.

SO ORDERED.